Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, CLERK

No. 88-1678

In The

Supreme Court of the United States

October Term, 1988

RICHARD WALTON,

Petitioner,

vs.

SCOTT B. MERRIMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND BRIEF OF AMICUS CURIAE

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QUESTIONS PRESENTED

Appellants complain that the issues before this Honorable Supreme Court are twofold:

1. "Whether the court below erred in analyzing an officer's qualified immunity by not considering any of the clearly established, factually similar federal or state law in effect on July 17, 1986, as required by *Anderson v. Creighton*, 483 U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), when it ruled that no reasonable police officer could have believed there was probably cause to effect a warrantless arrest after an eyewitness reported a kidnapping."

2. "Whether the court below erred by not considering all the information possessed by the arresting officer, as required by *Anderson*."

Respondent submits that the real issue is whether or not the United States Court of Appeals for the Ninth Circuit in *Merriman v. Walton*, a published case, erred in holding that the District Court's denial of petitioners/appellants' motion for summary judgment was proper.

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Respondent, Scott B. Merriman, respectfully requests this Honorable United States Supreme Court deny petitioner's petition for a writ of certiorari based upon the decision rendered in *Merriman v. Walton*, 856 F.2d 1333 (9th Cir. 1988), filed September 7, 1988.

OPINIONS BELOW

The United States District Court for the Northern District of California, the Honorable Samuel Conti, presiding, denied petitioner's motion for summary judgment in a written opinion. Upon appeal to the United States

Court of Appeals for the Ninth Circuit, the District Court's written opinion was affirmed with the reasons set forth in *Merriman v. Walton*, 856 F.2d 1333 (9th Cir. 1988).

JURISDICTION

The judgment of the court of Appeals for the Ninth Circuit was entered on September 7, 1988. After a petition for rehearing *en banc* was unanimously denied on January 13, 1989, petitioner, on the 90th day, filed their petition for a writ of certiorari before this Honorable Supreme Court alleging jurisdiction under 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Section 1983, states as follows:

> Section 1983. Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regualtion, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The United States Constitution, Amendment IV, states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

Scott B. Merriman, a 26 year old music teacher employed at Trinidad Elementary School in Trinidad, California, was arrested *without a warrant* by a Humboldt County Sheriff's Deputy for the very serious felony crime of kidnapping of his own girlfriend of two years on July 17, 1986. (The infamous Chowchilla kidnapping of elementary school children still lingers in the minds of most Californians to this date.) The warrantless arrest occurred some 17 hours after it was first reported and some 5 hours after the alleged girlfriend/victim had returned to her home safely. (CR 24)[1]

The sequence of events prefacing the warrantless arrest can be stated briefly:

A female acquaintance and apparently one-time friend of the alleged victim, Wendy Cantrell, who was the girlfriend of the respondent, after drinking with the alleged victim for most of the day on July 16, 1986, called

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[1] All citations are to the Clerk's Record before the Ninth Circuit Court of Appeals.

the victim's half-brother at approximately 11:00 p.m. on that same date and claimed that Wendy Cantrell had been abducted by Mr. Merriman (the alleged victim's boyfriend) some 5 hours earlier. (Id.) This reporting party was neither asked nor gave any explanation as to why she waited 5 hours before she reported this alleged semi-violent kidnap. (Id.) The report of the kidnap was taken telephonically from the half-brother of the alleged victim who was told that his half-sister was kidnapped by the girlfriend. (Id.) Neither the half-brother of the alleged victim nor the girlfriend who was the reported eyewitness to this event was personally interviewed or personally contacted by any member of law enforcement. (Id.)

According to the evidence presented to the District Court, as well as the United States Court of Appeals, the alleged kidnapping consisted of the boyfriend taking his girlfriend by the arm from the car of the intoxicated victim's friend at approximately 5:30 on the evening of July 16, 1986, and telling the friend that he was taking her to "the cabin". (Id.)

The information, afordescribed, was picked up by Deputy Richard Walton, a veteran and experienced Deputy Sheriff for the Humboldt County Sheriff's Department during the swingshift that he worked at the time which ended at 2:00 a.m. on the morning of July 17, 1986. (Id.) Neither he nor any other member of the Sheriff's Department attempted to seek an arrest warrant based on that information. (Id.) Nor did any Sheriff's Deputy or other officer attempt to contact the mother or the son of the victim at her regular place of residence. (Id.) Rather, an All-Points Bulletin was put out to all members of law

enforcement in Humboldt County. (Id.) Deputy Walton went home at the end of his shift. (Id.)

On the afternoon of July 17, 1986, the half-brother of the alleged victim reported that his half-sister had returned home and urged her to call the Sheriff's Department. (Id.) The alleged victim did call the Sheriff's Department and reported that she wished that no charges would be filed and stated that she might consider some sort of restraining order. She emphatically stated that no kidnapping or crime had occurred. (Id.)

Upon learning that the Sheriff's Department was looking for him, Mr. Merriman immediately telephoned the Sheriff's Department and told them that he would be available after work if they wanted to speak with him. (Id.) He told them where he would be. (Id.)

Even though no Deputy Sheriff sought to interview or contact in any way the alleged victim who had returned safely home, Deputy Walton, in spite of this knowledge, proceeded to the residence of Elaine Howell, an elderly lady who was a lifetime resident of Humboldt county and a long-time friend of Mr. Merriman. (Id.) He was accompanied by a member of the California Highway Patrol. (Id.) He asked Mrs. Howell if he could enter her residence and speak with Mr. Merriman at approximately 5:30 in the afternoon. (Id.) Mrs. Howell gave her permission and Deputy Walton entered the home where he asked Mr. Merriman a series of questions about the events of the preceding evening. (Id.) Mr. Merriman was cooperative, answered the questions, offered to take a lie detector test, and offered to help the officer find Wendy,

his girlfriend. (Id.) He emphatically denied any kidnapping of his own girlfriend and related to the officer how the excursion to the cabin was a preplanned date. (Id.) He also told the officer that his girlfriend very much wanted to leave the company of her girlfriend because of her intoxicated state and other belligerencies. (Id.)

Instead of seeking an arrest warrant or otherwise detaining Mr. Merriman, Deputy Walton arrested Mr. Merriman for the felony crime of kidnap and transported him to the Humboldt County jail where he was lodged in lieu of bail in the sum of $75,000.00. (Id.) On July 18, 1986, a private attorney retained by Mrs. Howell contacted the District Attorney's Office and explained to them what had happened. The Deputy District Attorney then ordered the Sheriff's Department to release Mr. Merriman and no charges have ever been filed. (Id.)

As noted by petitioner, Mr. Merriman ultimately brought his action for false arrest in the Federal Court which then resulted in petitioner vigorously pursuing a motion for summary judgment which was brief and denied. After extensive discovery as noted by the Court of Appeals for the Ninth Circuit, the denial of the motion for summary judgment was appealed, brief, and argued, resulting in a published decision filed September 7, 1988. (Id.)

ARGUMENT

THE COURT OF APPEALS FOR THE NINTH CIRCUIT, CONTRARY TO PETITIONER'S SUGGESTIONS, SPECIFICALLY CONSIDERED THE "CLEARLY ESTABLISHED LAW" AS SET FORTH IN *ANDERSON V. CREIGHTON*, WHEN IT RULED THAT WALTON WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

The Court of Appeals for the Ninth Circuit very specifically cited the test mandated by *Anderson v. Creighton*, 483 U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), stating as follows:

> "*Anderson v. Creighton*, 107 S.Ct. 3034 (1987), sets forth the inquiry concerning the existence of a clearly established right under the fourth amendment: 'The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable police officer could have believed [the plaintiff's] warrantless [arrest] to be lawful, in light of clearly established law and the information the searching officers possessed.' Id. at 3040; see also *Torner v. Gates*, 811 F.2d. 1240, 1242 (9th Cir. 1987) (quoting *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986)) (finding that an officer was entitled to qualified immunity if he 'acted under an objectively 'reasonable (even if mistaken) belief that what [he was doing] was lawful'."

The Court went on to note that the question in the instant case was:

> " . . . whether a reasonable police officer, knowing what Walton knew, could have believed there was probable cause for Merriman's warrantless arrest. We think the answer is no."

The Court then noted that probable cause is now determined by applying the "totality-of-the-circumstances" analysis required by *Illinois v. Gates*, 462 U.S. 213, 238 (1983)." *Illinois v. Gates, supra*, noted that probable cause requires "a probability or substantial chance of criminal activity." Id. at 243 n. 13.

Rightfully, an accurate and complete and believable statement by an eyewitness should, in some circumstances, be amply sufficient to provide probable cause for an arrest warrant and perhaps even a warrantless arrest. What petitioner argues for, however, is a statement by this Honorable United States Supreme Court of America that whenever a disgruntled person (who is never personally interviewed by law enforcement) claims that someone is kidnapped, then an officer can effect a warrantless arrest of a citizen of this country even though prior to effecting the arrest the arresting officer knows that the alleged victim has returned safely to his or her home and that the suspect has been fully cooperative in all regards. In other words, the petitioner urges that once one's neighbor, friend, or acquaintance, calls law enforcement and reports a crime the person that they are accusing can be arrested without a warrant even though in the intervening time period the officers did not take the opportunity to contact the alleged victim and did receive the full cooperation of the alleged perpetrator.

To sanction the arguments advanced by petitioner would mean that any United States citizen who, as Mr. Merriman, had a good reputation and was otherwise a responsible citizen, could be arrested without a warrant anytime someone, over the phone, reported that the citizen had committed a crime. Further, if this were indeed

the case, the innocent citizen would be deprived of any redress contrary to the provisions of Title 42, United States Code, Section 1983, if the arresting agency or officer claimed the defense of qualified immunity, even though the citizen's reputation as a school teacher, a minister, or any other reputable occupation was completely ruined. The aggrieved citizen's only remedy would be against the person who made the false report.

In short, if the petitioner's argument is to be sustained, then there is no meaning whatsoever to the "right of redress" guaranteed by 42 U.S.C., Section 1983.

In reaching their decision, the Ninth Circuit Court of Appeals unanimously acknowledged the mandates of this Honorable United States Supreme Court in its decision in *Anderson v. Creighton, supra*. It clearly considered the cases that dealt with probable cause to effect an arrest without a warrant. It clearly considered the rights of police officials to employ the defense of qualified immunity, and it clearly considered the fact that before any trial is had, "extensive discovery" should take place to determine whether or not a meritorious claim exists. What is so aptly realized, however, was the fact that no United States citizen should suffer from the stigma of a serious felony arrest based upon accusation alone. It further realized that the doctrine of "qualified immunity" and the cases that have interpreted its meaning do not provide law enforcement officers with a carte blanche arrest power based upon a mere accusation alone.

At the risk of sounding contrite, respondent suggests that it would be deplorable to immunize every officer from a lawsuit in spite of the provisions of Title 42,

Section 1983, where the officer arrested and incarcerated a boyfriend who did nothing more than take his girlfriend to a preplanned and predestined location over the objection of some complaining acquaintance of the girlfriend, especially when the officer had ample opportunity to interview all parties and to conduct a reasonable investigation in an effort to determine what the true facts were.

CONCLUSION

The Court of Appeals for the Ninth Circuit amply considered the "clearly established law". It properly refused to accord Deputy Walton the so-called "qualified immunity" defense when it concluded that, " . . . a reasonable police officer, knowing what Walton knew," would have effected a warrantless arrest. Thus, it is respectfully requested that petitioner's request of this Honorable United States Supreme Court for a writ of certiorari be denied.

Respectfully submitted,

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